Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

**IN THE**
**SUPREME COURT of the UNITED STATES**

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Robert W. Grine II, Joanne D. Grine, Estate of Margaret M. Grine,
*Petitioners*

vs.

WILLIAM R. COOMBS; BILLIE M. YOST; JACK W. SHRUM, ET UX; ROTOCAST PLASTIC; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, Borough Manager of Tionesta, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as an agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY (EPA); MICHAEL MCCABE, Regional Administrator, Region III, U.S. EPA;
*Respondents*

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**On Petition for a Writ of Certiorari**
**To the Third Circuit Court of Appeals**

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# PETITION FOR A WRIT OF CERTIORARI

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22 pp

## QUESTION PRESENTED

I. Whether the Third Circuit Court of Appeals infringed upon Petitioners' fundamental rights to due process and rights of access to the courts when it summarily granted the United States' Rule 27 Motion to dismiss the Petitioners' appeal as of right from a final order certified pursuant to Rule 54(b), on grounds that the appellate court lacked jurisdiction over the subject matter of the appeal?

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**IN THE**
**SUPREME COURT of the UNITED STATES**

---

Robert W. Grine II, JoAnne D. Grine, and the
Estate of Margaret M. Grine,
*Petitioners*

vs.

The Estate of William R. Coombs, et al,
*Respondents*

---

**Petition for a Writ of Certiorari**
**To the United States Court of Appeals**
**for the Third Circuit**

---

Petitioners, Robert W. Grine II, JoAnne D. Grine, and the Estate of Margaret M. Grine, respectfully pray that a writ for certiorari issue to review the order of the United States Court of Appeal for the Third Circuit entered in this proceeding on February 27, 2002.

## OPINIONS BELOW

The summary decision of the Third Circuit Court of Appeals which granted the United States' Rule 27 Motion to dismiss the Petitioners' Appeal as docketed at No. 01-4118 and as taken from the district court order certified in accordance with Rule 54(b) of the Federal Rules of Procedure and entered on September 19, 2001, was filed on February 27, 2002; it appears at Appendix A (App. A) and it is unreported.

The appellate order summarily denying the Petitioners' timely-filed Petition for Rehearing was entered on April 23, 2002, it appears at Appendix B (App. B), and is unreported.

## GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The summary decision of the United States Court of Appeals granting the United States' Rule 27 Motion for Dismissal of the appeal at No. 01-4118 was entered on February 27, 2002. The Court of Appeals denied Petitioners' timely-filed Petition for Rehearing on April 23, 2002.

The question presented did not arise until Petitioners received the appellate court's order of February 27, 2002 granting the United States' Rule 27 Motion to dismiss the appeal docketed at No. 01-418 by the Court of Appeals on November 14, 2001. Petitioners thereupon sought rehearing arguing that the Court of Appeals had erred in prohibiting a timely appeal as of right from a final order and that its decision resulted in fundamental unfairness and a violation of the due process clause of the federal constitution.

The jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked pursuant to 28 U.S.C. §1331.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the Fifth Amendment to the United States Constitution which provides, in pertinent part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

This case also concerns Section 1291 of Title 28, U.S.C., which provides that "the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States ..."

## STATEMENT OF THE CASE

Petitioners' initial complaint was filed on December 21, 1995; their Amended Complaint was filed on April 2, 1996. Petitioners are Robert W. Grine, II, Joanne D. Grine, and the Estate of Margaret M. Grine; Defendants were William R. Coombs; Billie M. Yost; Jack Shrum, et. ux.; Essex Environmental Industries, Inc.; Rotocast Plastic Products, Inc.; Tionesta Borough Council, Ronald hall, President of Borough Council, in an individual and official capacity; Scott Daum, Borough Manager of Tionesta, in an individual and official capacity; Commonwealth of Pennsylvania, Department of Environmental Protection; Daniel Holler, Emergency Response Coordinator, Northwest Region, in an individual and official capacity; Gary Wozniak, in an individual and official capacity; United States of America Environmental Protection and Michael McCabe, Regional Administrator, Region III, U.S. EPA.

Petitioners brought suit under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §6901 et. seq., the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §1251 et. seq., and the Comprehensive Environmental Response, Compensation, and Liabilities Act of 1980 ("CERCLA"), 42 U.S. C. §9601 et. seq., as amended by the Superfund Amendments and Reauthorization act of 1986. Petitioners also brought suit against the US EPA and its Region III Director under the Freedom of Information Act, 5 U.S.C. §552. The Amended Complaint also assets causes of action under the state common-law theories of intentional infliction of emotional distress, trespass, nuisance and strict liability, as well as a claim pursuant to the Pennsylvania Hazardous Sites Cleanup Act ("PHSCA"), 35 Pa. Stat. Tit. 35, §6020.101 et seq.

Petitioners were the victims of rogue or midnight dumping of acutely hazardous toxic substances transported in federally-licensed overpack drums abandoned in close proximity to their home and private water supply. After they sued individual owners of the site, transporters, corporate entities who generated the waste, and government agencies which had failed to investigate the nature and extent of the contamination, Petitioners became the targets of a grand jury convened to investigate the commission of an environmental crime, and were surveilled by federal agents.

All Defendants, including the U.S. EPA in the person of its agents on the site, are in violation of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §6901 et seq., and disposed of or caused other to dispose of waste materials on the Coombs site; the material so disposed of was defined by law to be a hazardous waste. The federal Defendants knew that the wastes had the potential to be harmful to others or to the environment; Defendants knew that the wastes site did not have a permit or interim status authorizing treatment, storage or disposal of hazardous wastes. The U.S. EPA possessed the authority to abate illegal activity on the Coombs site, and failed to end such activities.

All Defendants, and others as yet unknown to Plaintiffs, knowingly conspired and agreed together to dispose of hazardous wastes without a permit, in violation of RCRA. All Defendants knowingly disposed of and caused, counseled, commanded, induced and procured the knowing disposal of hazardous wastes as defined in 40 CFR 261.10 et seq.

Plaintiffs sued all Defendants as owner or operators of an unpermitted facility, as that term is defined in §101(9) of the

Comprehensive Environmental Response and Liability Act of 1980, 42 U.S.C.A. §9601 et seq., as amended by both the Superfund Amendments and Reauthorization Act of 1986, and as arrangers for the disposal of hazardous substances.

Plaintiffs sued Defendants U.S. EPA under the Freedom of Information Act, as amended, (5 U.S.C. §552(a)(4)(h), and sought injunctive relief against the United States. Plaintiffs also asked for attorneys' fees and costs.

Plaintiffs requested consequential and punitive, special and incidental damages, plus attorneys' fees and costs, from all Defendants, and also requested injunctive and declaratory relief. Plaintiffs requested that court fines be assessed against all Defendants; Plaintiffs asked that they be awarded any and such other legal and equitable relief as the court deemed proper.

On August 13, 1996, the U.S. EPA motioned for summary judgement on Plaintiffs FOIA claims. On August 19, 1996, the U.S. EPA filed a motion to dismiss certain claims in the Plaintiffs' Amended Complaint. They also filed a brief in opposition to Plaintiffs' Motion for Writ of Mandamus. U.S. EPA's Motion for Summary Judgement was granted in part, but with respect to certain claims the motion was taken under advisement by the district court.

On December 27, 1996, the district court granted the United States' Motion to Dismiss the Amended Complaint and the Petition for Writ of Mandamus. On December 18, 1997, Petitioners motioned for an order adjudging the U.S. EPA and the PA DEP in civil contempt. Petitioners filed a motion for reconsideration of the order of December 27, 1996, and the order of February 9, 1998, on March 10, 1998. The

district court issued an order limiting the scope of a contempt hearing in relation to the U.S. EPA on August 25, 1998.

Petitioners' Motion for Reconsideration of the district court's order of December 27, 1996 was denied by the district court on February 27, 2001.

Plaintiffs' Motion for Reconsideration of the order of August 25, 1998, was filed on February 26, 2001 and denied by the district court on May 2, 2001.

At the conclusion of the hearing of September 19, 2001, the district court judge granted the federal motion for Rule 54(b) certification of the order granting the United States Motion to dismiss the Amended Complaint. The district court directed the entry of a final "judgement" dismissing all claims against the U.S. EPA.

The district court judge then purported to stay "enforcement" of the order of dismissal until the end of the case, pursuant to Fed. R.C.P. Rule 62(h).

(On October 22, 2001, the order of September 19, 2001 was entered into the record by the district court.) On October 30, 2001, the Petitioners filed a notice of appeal from the final order of the United States District court for the Western District of Pennsylvania at No. 95-CV-342, as initially entered on December 27, 1996, and certified as a final order in accordance with Rule 54(b) on September 19, 2001.

## REASONS FOR GRANTING THE WRIT

### I. The decision of the Third Circuit Court of Appeals conflicts with this Court's precedents and with settled law in the Third Circuit.

The Court of Appeals has erred in ruling that it lacks subject-matter jurisdiction over an appeal as of right from a final order. The rule of finality is not subject to a judicially created exception at the district court level through the district court's improper reliance on Fed. R. Civ. Proc. Rule 62(h), in conjunction with a Rule 54(b) certificate of finality.

The district court has successfully eliminated plaintiffs' right to take an immediate appeal from an order certified in accordance with Rule 54(b) as a final order.

The court has also successfully insulated its order from review or reconsideration before an end-of-case judgement because its order has lost its interlocutory status, even though it is protected from review.

The district court has thus entered an order that cannot be challenged on any grounds whatsoever until judgement day.

Rule 54(b) certification of an order for immediate appeal makes such an order appealable as of right, and reliance on Rule 62(h) does not invalidate Rule 54(b) on this point. "The requirement in Rule 54(b) that the court make an express determination that there is no just reason for delaying the review of a judgement on fewer than all the claims ... eliminates any doubt whether an immediate appeal may be sought." Fed. Practice & Procedure, Wright, Miller

& Kane, Civil 2nd §2254, p. 38. (Emphasis supplied, footnote omitted.)

Rule 54(b) "provides an opportunity for litigants to obtain from the District Court a clear statement of what the court is intending with reference to finality ..." Dickensen v. Petroleum Conversion Corp., 70 S. Ct. 322, 324 (1950).

The Court of Appeals must accept jurisdiction over an appeal if it is satisfied that the district court's order is properly before it; 28 U.S.C.S. §1291.

Because the Rule 27 motion as framed by the federal appellees implicated the scope of the court's appellate jurisdiction, it was incumbent on the Court of Appeals to establish the propriety of the district court's certification of its own order for immediate appeal, pursuant to Rule 54(b). Since the appellate court never sought to review or disturb the certificate of finality, the district court's certified order can sustain an appeal.

The appellate court made no inquiry whatsoever of record to determine if certification was proper, and let the entry of certification pursuant to Rule 54(b) stand undisturbed as executed by the district court judge. Thus, the Court of Appeals did not restore the interlocutory character of the district court judge's adjudication. The scope of appellate jurisdiction was never delineated by the appellate court through meaningful review of the record (or through anything approaching meaningful review of the propriety of the certification.)

The Court of Appeals in the guise of dealing summarily with the Rule 27 motion submitted by the federal appellees did nothing to disturb the district court's Rule 54(b) certification.

The Court of Appeals thus let stand the district court's adjudication pursuant to Rule 54(b). Because the Court of Appeals' appellate jurisdiction is strictly a matter of statute, Congress's determination that Courts of Appeal should hear only final orders is conclusive. Bensalem v. Am. Fidelity Fire Ins. Co., 644 F.2d 990 (3rd Cir 1981). If the district court properly made its Rule 54 certification, the Court of Appeals must then exercise jurisdiction over the appeal. Del. Valley Citizens Council for Clean Air v. Davis, 932 F.2d 256 (3rd Cir. 1991). In this case, the Court of Appeals never considered the propriety of the rule 54(b) certification, even though certification implicated the scope of its jurisdiction.

As this Court unambiguously stated in Delaware Valley, if the district court properly certified its orders as final judgements for purposes of appeal, the Court must then exercise its jurisdiction over an appeal as of right.

Accordingly, the Court of Appeals has subject-matter jurisdiction over this interlocutory appeal by virtue of the district court's certification and by virtue of the effect of 28 U.S.C.A. §1291. "If the district court properly made that certification, we must then exercise jurisdiction over this appeal pursuant to 28 U.S.C.A. §1291 (West. Supp. 1990). See Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 8, 100 S. Ct. 1460, 1465, 64 L.Ed.2d 1 (1980); Culbreth v. Amosa (Pty) Ltd., 898 F.2d 13, 14 ((3rd Cir. per curiam))." Delaware Valley, at 263.

Rule 62 cannot be utilized to limit the scope of appellate jurisdiction as conferred on the Courts of Appeal by statute.

Rule 62(h), Stay of judgement as to Multiple Claims or Multiple Parties, states only that "when a court has ordered a final judgement under the conditions stated in Rule 54(b),

the court may stay enforcement of that order until the entering of a subsequent judgement or judgements and may prescribed such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgement is entered." Rule 62(h) can only be utilized to stay execution of a judgement made on the merits.
In Curtiss-Wright Corp. v. General Electric Company, 100 S. Ct. 1460 (1980), the order that was certified was the district court's granting of summary judgement on the merits of a nineteen-million dollar claim for balance due on specific contracts. Ftn. 3 in Curtiss-Wright means what it says: "We note that Federal Rule of Civil Procedure 62(h) allows a court certifying a judgement under Rule 54(b) to stay its enforcement until the entering of a subsequent judgement or judgements." (Emphasis supplied.) Rule 62(h) has never been used in Curtiss-Wright or any other case to stay an appeal as of right from a final order invoking statutory and constitutional grants of jurisdiction to an Article III court.

The district court judge who dismissed appellants' complaint for lack of jurisdiction over the subject-matter had no power to enter a subsequent judgement on the merits and no power to execute on a judgement. He could not "enforce" an order dismissing claims in the amended complaint for lack of jurisdiction.

"Without jurisdiction, the court cannot proceed at all in any course. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 7 Wall. 506, 514, 19 L.Ed 264 (1869), cited in Steel Co. v. Citizens for Better Envir., 140 L.Ed.2d 210, 227 (1998). And see: Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382, 28 L.Ed 462 (1884).

The Court of Appeals has never concluded (certainly not through its summary disposition of a Rule 27 motion without explanation or opinion) that the district court orders as certified pursuant to Rule 54(b) are not final orders within the meaning of §1291, with regard to the claims to which they apply.

This is improper when the Court of Appeals is purporting to deal with a query as to the scope of its jurisdiction. The district court thus made its adjudication final when it executed its certificate in light of the appellate court's failure (or its refusal) to review the propriety of certification de novo.

The Court of Appeals never determined (other than summarily, and off the record) whether the district court's certification had the requisite aspects of finality. Such a review is mandatory in order to establish the scope of appellate jurisdiction. This is a deprivation of the appellants' rights of due process. The district court made its adjudications final when it executed its certificate. Petitioners have the same right to take an appeal as any other litigants in this system. No viable exception to the scope of appellate jurisdiction has been drafted by the district court, by the federal appellees, or by this Court.

Because appellants have been summarily denied their right to take an appeal from a final order, within the meaning of 28 U.S.C.A. §1291, they have been denied their due process right of meaningful access to the courts. The Court's summary dismissal of this appeal from a final order is constitutionally defective.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: July 20, 2002

Respectfully,

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# APPENDIX

| | |
|---|---|
| Appendix A | Summary Decision of Third Circuit Court of Appeals Granting the United States' Rule 27 Motion to Dismiss the Petitioners' Appeal for Lack of Subject-Matter Jurisdiction |
| Appendix B | Summary Decision of the Third Circuit Court of Appeals Denying the timely-filed Petition for Rehearing |

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

January 25, 2002
D-43

Docket No. 01-4118

ROBERT W. GRINE, JOANNE D. GRINE
And MARGARET M. GRINE, Appellants
vs
WILLIAM R. COOMBS, ET AL.
(Western District Civil No. 95-cv-00342) (SJM)

**Present:** **NYGAARD, ROTH and BARRY Circuit Judges**

(1) Motion of Federal Appellees for Dismissal of Appeal for Lack of Appellate Jurisdiction;
(2) Appellants' Response to Appellees' Rule 27 Motion for Summary Dismissal of Appeal for Lack of Appellate Jurisdiction;
(3) Motion by Federal Appellees for Leave to File Reply to Response to Motion to Dismiss Out of Time;
(4) Reply of Federal Appellees to Response of Appellant to Motion to Dismiss Appeal for Lack of Appellate Jurisdiction, not filed unless the Court so directs.

Dana Moore Case Mgr.
(267) 299-4927

**Copy of Clerk's 1/16/02 Order Sent for Court's Information.**

**ORDER**

**The foregoing** motion to dismiss is granted. The motion to file the reply out of time is denied as moot.

Dated: Feb. 27, 2002

By the Court,

Circuit Judge

DMM/cc: Janice S. Haagensen, Esq.
Bonnie R. Schlueter, Esq.
Russell F. Smith, III, Esq.

**APPENDIX A**

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 01-4418

---

ROBERT W. GRINE II; JOANNE D. GRINE;
ESTATE OF MARGARET M. GRINE,
Appellants

v.

BILLIE M. YOST; JACK W. SHRUM, ET UX; ROTOCAST PLASTIC PRODUCTS; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL OF FORREST COUNTY; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, BOROUGH MANAGER OF TIONESTA, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as an agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; MICHAEL MCCABE, Regional Administrator, Region III, U.S. EPA; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY (EPA);

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On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Civ. No. 95-cv-00342)

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SUR PETITION FOR REHEARING

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BEFORE: BECKER, Chief Judge.
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO and FUENTES, Circuit Judges

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**APPENDIX B**

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service, and no judge who concurred in the decisions having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

/s/
United States Circuit Judge

DATE: April 23, 2002
DMM/cc: Janice S. Haagensen, Esq.
Russell F. Smith, III, Esq.
Bonnie r. Schlueter, Esq.

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No. 02-218

# In the Supreme Court of the United States

ROBERT W. GRINE, JOANNE D. GRINE, AND ESTATE OF MARGARET M. GRINE, PETITIONERS

*v.*

WILLIAM R. COOMBS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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13 pp

## QUESTION PRESENTED

Whether the court of appeals erred in dismissing petitioners' appeal for lack of jurisdiction.

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# In the Supreme Court of the United States

No. 02-218

ROBERT W. GRINE, JOANNE D. GRINE, AND ESTATE OF MARGARET M. GRINE, PETITIONERS

*v.*

WILLIAM R. COOMBS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The order of the court of appeals (Pet. App. A1) is unreported. The order of the district court is unreported.

### JURISDICTION

The decision of the court of appeals was entered on February 27, 2002. A petition for rehearing was denied on April 23, 2002 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on July 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This is the fourth time petitioners have filed a petition for a writ of certiorari in this case against multiple private parties and federal, state, and local governments.[1] In addition, since the initiation of this litigation, petitioners have: (1) appealed the district court's decision to the court of appeals seven times; (2) sought and been denied rehearing and rehearing en banc numerous times; and (3) sought and been denied a writ of mandamus removing the trial judge from the matter. The litigation against the private defendants is still unresolved in the district court.

1. Petitioners filed suit in 1995 in federal district court against multiple private parties and federal, state, and local government defendants. Petitioners allege that hazardous waste migrated to their property from barrels on an adjacent tract, damaging their land and living environment. In April 1996, they amended their complaint to assert claims under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*, the Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, state common law, and the Pennsylvania Hazardous Sites Cleanup Act, 35 Pa. Cons. Stat. Ann. §§ 6020.101 *et seq.* (West 1993).

In their amended complaint, petitioners added the United States Environmental Protection Agency (EPA) as a defendant. Petitioners charged, *inter alia*, that the EPA had violated the Freedom of Information Act (FOIA), 5 U.S.C. 552, by failing to disclose certain documents. After numerous motions and hearings

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[1] See *Grine* v. *Coombs*, 532 U.S. 1021 (2001); *Grine* v. *Coombs*, 528 U.S. 1160 (2000); *Grine* v. *Coombs*, 526 U.S. 1117 (1999).

regarding petitioners' claims against the EPA, the district court held a final hearing on the remaining FOIA claims and a motion for contempt that petitioners had filed against the EPA. On September 19, 2001, the court issued a decision from the bench in which it found that the EPA had fully satisfied its obligations under FOIA and that there was "an utter lack of evidence" that the EPA was in civil contempt. 9/19/01 Tr. 1-20. At the end of the hearing, the court granted the EPA's motion for certification under Federal Rule of Civil Procedure 54(b) of its order granting the EPA's motion to dismiss petitioners' amended complaint. Rule 54(b) reads in relevant part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.
> * * *

Fed R. Civ. P. 54(b). On October 22, 2001, the district court entered an order memorializing its September 19 bench decision granting the EPA's motion for Rule 54(b) certification.

The district court certified the judgment under Rule 54(b) because, as the court found, the "equities do tip in favor of certification." 9/19/01 Tr. 24. The court also found that petitioners' claims against the EPA were "distinct" from those asserted against the other defendants, rendering duplicative work in the court of appeals unlikely. *Ibid.*

At the same time, the court stayed enforcement of that judgment under Federal Rule of Civil Procedure 62(h), so as to "completely foreclose any possibility of scattered appeals." 9/19/01 Tr. 24 (quoting *In re National Smelting of New Jersey, Inc. Bondholders' Litigation*, 695 F. Supp. 796, 799 (D.N.J. 1988)). Rule 62(h) provides:

> When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Fed R. Civ. P. 62(h). The court explained that the Rule 54(b) certification and simultaneous Rule 62(h) stay of enforcement would serve to "finalize the judgments * * * for the purposes of any further action in this case at this level and insure that any appeals from judgments in this case will be simultaneously heard." 9/19/01 Tr. 25 (quoting *National Smelting*, 695 F. Supp. at 800).

2. On October 30, 2001, petitioners filed a notice of appeal of the district court's final order. In a summary order dated February 27, 2002, the court of appeals granted the EPA's motion to dismiss for lack of appellate jurisdiction. Pet. App. A1. A petition for rehearing was denied, again without opinion, on April 23, 2002. *Id.* at B1-B2.

## ARGUMENT

The unreported, summary order of the court of appeals dismissing petitioners' appeal for lack of juris-

diction does not warrant review by this Court. The decision has no precedential effect, establishes no conflict, and reaches the proper result.

1. It is well settled that "the district court is permitted to determine, in the first instance, the appropriate *time when each 'final decision'* upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal." *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435 (1956). In that capacity, the district court acts as "dispatcher" to the court of appeals. *Id.* at 435-437. This Court has reiterated that rule, stressing that "[i]t is left to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal." *Curtiss-Wright Corp.* v. *General Elec. Co.*, 446 U.S. 1, 8 (1980).

In *Curtiss-Wright*, this Court reaffirmed both the requirement that district courts heed the general policy against piecemeal appeals and the discretion owed to trial court determinations under Rule 54(b). 446 U.S. at 8. Accordingly, an appellate court in Rule 54(b) cases must ensure that the "juridical concern[]" of "prevent-[ing] piecemeal appeals" is met, and must give the district courts' discretionary judgments "substantial deference." *Id.* at 10.

Here, the district court found that it was appropriate to prevent piecemeal appeals. As noted above, many issues remain to be resolved among numerous other parties. By issuing a stay of the judgment under Rule 62(h) after certifying it under Rule 54(b), the court sought to "finalize the judgments * * * for the purposes of any further action in this case at this level and insure that any appeals from judgments in this case will be simultaneously heard." 9/19/01 Tr. 25 (quoting

*National Smelting*, 695 F. Supp. at 800, and citing *Curtiss-Wright*, 446 U.S. at 13 n.3).

Petitioners do not dispute the legitimacy of the district court's determination that piecemeal appeals would not be appropriate. Rather, they contend that the mechanism employed by the district court to effectuate that determination was flawed and denied them due process. In particular, they note that Rule 62(h) allows for delaying the enforcement of judgments pending the resolution of other claims in the district court, not for preventing piecemeal appeals. Rule 62(h) is indeed a stay of enforcement, not appealability. See Fed. R. Civ. P. 62(h) advisory committee's note. The D.C. Circuit has noted that stays under Rule 62 "do not impede appeals from the stayed dispositive order; their sole purpose is to preserve the status quo while an appeal is in the offing or in progress." *National Treasury Employees Union* v. *FLRA*, 712 F.2d 669, 671 (D.C. Cir. 1983). Similarly, other courts of appeals, in reviewing judgments stayed under Rule 62(h), have proceeded with the understanding that a stay under Rule 62(h) subsequent to Rule 54(b) certification does not interfere with the appealability of that judgment. See *In re Bulldog Trucking, Inc.*, 66 F.3d 1390, 1392-1393 (4th Cir. 1995); *Ziegler Chem. & Mineral Corp.* v. *American Gilsonite Co.*, 332 F.2d 668, 669 (9th Cir. 1964); *Wisconsin Liquor Co.* v. *Park & Tilford Distillers Corp.*, 267 F.2d 928, 933 (7th Cir. 1959). See also *Delaware Valley Citizens Council for Clean Air* v. *Davis*, 932 F.2d 256, 263 (3d Cir. 1991) (observing that "[i]f the district court properly made [the Rule 54(b)]

certification, we must then exercise jurisdiction over this appeal").[2]

It is not, however, the district court's order of which petitioners seek review in this Court. Rather, they seek review of the judgment of the court of appeals. That judgment, which dismissed petitioners' appeal for lack of jurisdiction, was correct. A court of appeals lacks jurisdiction over an improperly certified appeal. See *Sears, Roebuck & Co.*, 351 U.S. at 436. And certification is improper where, as here, the district court has decided against allowing an immediate appeal because piecemeal appeals would be inappropriate in view of the large number of appeals already brought by petitioners. In other words, where a trial court determines that an immediate appeal is inappropriate and then empowers the losing party to appeal by certifying a judgment under Rule 54(b), the court of appeals may properly conclude that the lower court should not have acted in such a self-defeating manner.[3]

Petitioners do not cite a single case in which a court of appeals decided to exercise jurisdiction where a

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[2] Rather than issuing a Rule 62(h) stay, therefore, the district court should have executed its decision to prevent piecemeal appeals by denying certification on the ground that the importance of precluding multiple appeals outweighed the equities. See *Curtiss-Wright*, 446 U.S. at 8 (discussing need to balance "equities" against "judicial administrative interests"); Fed. R. Civ. P. 54(b) advisory committee's note.

[3] In the court of appeals, we argued that the court should dismiss for lack of jurisdiction on the ground that the district court's Rule 62(h) stay precluded appellate jurisdiction. Although dismissal was the correct disposition, we now believe that the better reason for that result is that it was error for the district court to certify despite its determination that an immediate appeal would be inappropriate.

district court certified despite its decision that an immediate appeal should not lie. We are aware of none. The court of appeals, moreover, did not explain why it was dismissing for lack of jurisdiction. It thus did not announce a holding that conflicts with the decision of any other court of appeals. Review by this Court is, accordingly, unnecessary. See Sup. Ct. R. 10(a).

2. Even if it were assumed that the court of appeals relied on erroneous reasoning, this case still would not warrant further review. "This Court 'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)); see *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Because the judgment of the court of appeals here was correct, review by this Court is not warranted.

Further, petitioners are not aggrieved by the court of appeals' decision. They did not seek Rule 54(b) certification; rather, the EPA did. Accordingly, they never sought the very ability to bring a separate appeal that was denied. At issue here is not *whether* petitioners will be able to appeal, but rather *when* they may do so. Petitioners have no due process right to an immediate appeal, particularly in this situation where the district court clearly could (and should) have denied a Rule 54(b) certification.[4]

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[4] Nor is there any basis for petitioners to complain that they are aggrieved by their inability to litigate further against the EPA in the trial court. They have already done so extensively through numerous filings, motions, and hearings. See Pet. 4-7. And they may still move in the district court for relief from judgment under Federal Rule of Civil Procedure 60(b). In short, petitioners are currently in the same position they would have been in had the district court refused to certify.

Thus, petitioners' claim (Pet. 12) that "they have been denied their due process right of meaningful access to the courts" is without merit. Petitioners explain neither how they have been denied due process when they can appeal the judgment in favor of the EPA after all issues in the case have been resolved, nor why due process entitles them to bring an appeal prior to that time.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2002

Supreme Court U.S.
FILED
OCT 24 2002
OFFICE OF THE CLERK

(3)

No. 02-218

**IN THE SUPREME COURT of the UNITED STATES**

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Robert W. Grine II, Joanne D. Grine, Estate of Margaret M. Grine,
Petitioners

v.

William R. Coombs; et al.

---

**On Petition for a Writ of Certiorari**
**To the Third Circuit Court of Appeals**

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# REPLY BRIEF

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15 pp

## QUESTION PRESENTED

I. Whether the Third Circuit Court of Appeals infringed upon Petitioners' fundamental rights to due process and rights of access to the courts when it summarily granted the United States' Rule 27 Motion to dismiss the Petitioners' appeal as of right from a final order certified pursuant to Rule 54(b), on grounds that the appellate court lacked jurisdiction over the subject matter of the appeal, and without disturbing the propriety of the district court's execution of certification?

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Rule 62(h) ..... 3, 8

**IN THE**
**SUPREME COURT of the UNITED STATES**

---

No. 02-218

Robert D. Grine, Joanne D. Grine, and Estate of Margaret M. Grine, Petitioners

vs.

William R. Coombs, et al.

---

**On Petition for a Writ of Certiorari**
**To the United States Court of Appeals**
**For the Third Circuit**

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# Petitioners' Reply Brief

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## OPINIONS BELOW

The summary decision of the Third Circuit Court of Appeals which granted the United States' Rule 27 Motion to dismiss the Petitioners' Appeal as docketed at No. 01-4118 and as taken from the district court order certified in accordance with Rule 54(b) of the Federal Rules of Procedure and entered on September 19, 2001, was filed on February 27, 2002.

The appellate order summarily denying the Petitioners' timely-filed Petition for Rehearing was entered on April 23, 2002.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The summary decision of the United States Court of Appeals granting the United States' Rule 27 Motion for Dismissal of the appeal at No. 01-4118 was entered on February 27, 2002. The Court of Appeals denied Petitioners' timely-filed Petition for Rehearing on April 23, 2002.

The question presented did not arise until Petitioners received the appellate court's order of February 27, 2002 granting the United States' Rule 27 Motion to dismiss the appeal docketed at No. 01-418 by the Court of Appeals on November 14, 2001. Petitioners thereupon sought rehearing arguing that the Court of Appeals had erred in prohibiting a timely appeal as of right from a final order and that its decision resulted in fundamental unfairness and a violation of the due process clause of the federal constitution.

The jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked pursuant to 28 U.S.C. §1331.

## STATEMENT

Petitioners will not reiterate here the bulk of their statement of the case as detailed in their July-filed petition for certiorari, but do wish to reemphasize that in their Amended Complaint they brought suit against the U.S. EPA for violations of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §6901 et seq. and for violations of the Comprehensive Environmental Response and Liability Act of 1980, 42 U.S.C.A. §9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986. Petitioners also sued the U.S. EPA for its violation of the Freedom of Information Act, 5 U.S.C. §552.

## ARGUMENT

The federal appellees have made a startling concession in their brief in opposition as to the correctness of their prior argument presented in their Rule 27 Motion. Since such a confession is fresh, it needs to be discussed at the first opportunity. To begin with, the summary order of the Third Circuit Court of Appeals dismissing the petitioners' appeal from a certified order for lack of subject-matter jurisdiction is constitutionally defective and has resulted in the deprivation of the petitioners' substantive and procedural rights to due process of law. Review by this court is thus warranted.

The federal appellees argued strenuously in their Rule 27 Motion, as submitted to the Third Circuit, that the appellate court should dismiss petitioners' appeal for lack of subject-matter jurisdiction because the district court judge could prohibit an immediate appeal as of right from a certified order in reliance on Rule 62(h). The federal appellees knew that this argument was specious when they made it. As they have accurately reflected in their brief in opposition to the petition for certiorari, ". . . a stay under rule 62(h) subsequent to Rule 54(b) certification does not interfere with the appealability of that judgement." Fed. Brief at 6 (citations omitted).

The federal appellees should have completed their legal research before and not after they submitted their Rule 27 motion to the Court of Appeals.

A fatally flawed argument was both presented and embraced in bad faith (and in bad taste) by the federal appellees. The Third Circuit did nothing to signify its awareness of the impropriety of this argument; instead it ruled in favor of the federal appellees.

The Court of Appeals summarily (i.e., without explanation) granted the federal appellees' Rule 27 motion to dismiss the appeal for lack of subject-mater jurisdiction. The Court of Appeals <u>never</u> made the slightest attempt to assess the validity of the certification executed by the district court judge, and never acknowledged that prohibition of an

appeal subsequent to certification was truly unprecedented; i.e., unheard of. As petitioners have said before, the rule of finality is not subject to a judicially created exception at the district court level though the district court's improper reliance on Rule 62(h), in conjunction with a Rule 54(b) certificate of finality.

As the appellate court unambiguously stated in Delaware Valley, (Delaware Valley Citizens Council for Clean Air v. Davis, 932 F.2d 256 (3rd Cir. 1991)), if the district court properly certified its orders as final judgements for purposes of appeal, the Court must then exercise its jurisdiction over an appeal as of right.

Although it is late in the day, the federal appellees in their brief have recognized the wisdom of this position: See Fed. Brief at 6, 7: . . ."[I]f the district court properly made [the Rule 54(b)] certification, we must then exercise jurisdiction over this appeal." Delaware Valley, at 263. And, as this Court has held, "[I]f the District Court certifies a final order on a claim which arises out of the same transaction and occurrence as pending claims, and the Court of Appeals is satisfied that there has been no abuse of discretion, the order is appealable." Cold Metal Process Co. v. United Engineering & Foundry Co., 76 S. Ct. 904, 100 L.Ed. 1311 (1956).

The Court of Appeals must consider the propriety of Rule 54(b) certification because such certifications implicate the scope of the court's appellate jurisdiction. See Ebrahimi v. City of Huntsville Bd of Educ., 114 F.3d. 162 (11th Cir. 1997); Delaware Valley Citizens Council for Clean Air v. Davis, 932 F.2d 256 (3rd Cir. 1991): National Union Fire Insurance Company v. City Sav., F.S.B., 28 F.3d 376 (3rd Cir. 1994) as amended.

The appellate court made no inquiry whatsoever of record to determine if certification was proper, and let the entry of certification pursuant to Rule 54(b) stand undisturbed. The Court of Appeals never made any finding that the district court's decision to certify was erroneous. It never even considered the propriety of the Rule 54(b) certification as executed by the district court. Such a review

was mandatory to establish the scope of appellate jurisdiction. See Curtiss-Wright. Thus there is no disposition made of record to indicate that the Court of Appeals ever noticed or found that the district court orders as certified pursuant to Rule 54(b) were not final orders within the meaning of §1291.

The district court's adjudication became final when it executed its certificate. Without intervention by this court, petitioners will be denied an immediate appeal as of right from a standing final order, nor can petitioners ask for review or reconsideration of an order that has lost its interlocutory status, before an end-of-case judgement is effected at some future date.

Petitioners have been stripped of both their right to take an immediate appeal from a final order and their right to challenge the order on an interlocutory basis prior to judgement. The federal appellees are absolutely right when they note there is no other case on the books in which the district court judge certified an order prior to making the decision to prevent an immediate appeal. (To this we say: there is now.)

The Court of Appeals apparently dismissed for lack of subject-matter jurisdiction because it approved of the federal argument that the judge who executed the certification could decide to block an appeal of the certified order. This is the only possible explanation in view of the fact that the Court did not challenge the propriety of the certification executed in the district court. Petitioners are certainly not "in the same position that they would have been in had the district court refused to certify." (Fed. Brief at 8; Ftn. 4.) Petitioners have been denied due process because given the current posture of this case, they are confronted with an inviolate order which cannot be immediately appealed. Nor can it, prior to judgement day, be challenged or its revision sought because its true interlocutory character has never been restored by the appellate court. The Court of Appeals has not and does not intend to make the finding that it was error for the district court to certify, or to determine that immediate appeal could be precluded after certification.

The text of Rule 54(b) states the following:

(b) **Judgement Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgement as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgement. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgement adjudicating all the claims and the rights and liabilities of all the parties. (Emphasis supplied.)

So long as the certification is undisturbed, the appellants when they return to the district court cannot effect reconsideration or revision of said order.

Subsequent to the filing of Petitioners writ of certiorari on July 19, 2002, the petitioners motioned for clarification from the Court of Appeals as to date of issuance of the mandate. The Clerk of Court responded by personally denying the motion and stating that "the appeal was decided by an order on a motion and not by the entry of final judgement." See Exh. A, Denial of Appellant's Rule 27 Motion for Correction of Record and Issuance of Mandate. The Clerk stated that the Court had nothing to convey in the form of a directive to the district court: "The purpose of the mandate is to return jurisdiction back to the district court and to convey any directives of the court of appeals to the district court. Since this Court determined that it lacked appellate jurisdiction over the appeal, neither of these purposes would have been served by issuance of a mandate." The federal appellees appear to be under the impression that the Court of Appeals did effect a judgement: ". . .[T]hey [the Petitioners] seek review of the judgement of

the Court of Appeals. That judgement ... dismissed petitioners' appeal for lack of jurisdiction ..." Fed. Brief at 7.

This is a further illustration of the Court of Appeals' intent to leave untouched the certification effected in the district court and the district court's decision to prohibit an appeal as of right. Petitioners can neither take an immediate appeal from the certified order nor can they challenge the order on the grounds that it is interlocutory and open to revision prior to judgement. The district court, with the assistance of the federal appellees and the encouragement of the court of appeals, has fashioned an order inaccessible to any challenge from Petitioners. It is not inaccurate for petitioners to say that a sacred cow is on the horizon. Petitioners at the present time are unarmed against this development. It was the clear duty of the reviewing court to follow precedent; i.e., the appellate court was duty-bound to assess the propriety of the trial court's certification and the propriety of its attempt to eliminate an appeal subsequent to its own certification of the challenged order. See Curtiss-Wright. The Court of Appeals must scrutinize the district court's evaluation of factors resulting in certification for immediate appeal. It must also scrutinize the district court's desire to eliminate an immediate appeal subsequent to certification. The Court of Appeals was never ignorant of the fact that certification cannot be executed by a district court judge who intends to preclude an immediate appeal of the certified order. Thus, the Court of Appeals could not properly defer to the district court's judgement given its knowledge that the district court sought to eliminate the petitioners' right to an immediate appeal from a final order. If the Court of Appeals dismissed the appeal for lack of subject-matter jurisdiction because it liked the argument that the district court judge could execute the certification and at the same time eliminate the petitioners' right to take an immediate appeal, the Court erred. See Curtiss-Wright.

If the Court of Appeals believed that the certification was flawed, it had a duty to reach this conclusion on the record, and certainly was not free to defer to the defective reasoning of the district court.

The federal appellees were deadly accurate in their statement that "the court of appeals ... did not explain why it was dismissing for lack of jurisdiction." Fed. Brief at 8. They were dead wrong in suggesting that this failure does not create a conflict with other existing authority. On the contrary, the Court of Appeals' ruling is at war with every other decision in this area that is still on the books, including its own Third Circuit precedent and every Supreme Court opinion yet written on this subject. Of course, petitioners have not cited a case (other than this one) in which a court of appeals exercised jurisdiction over a certified order despite a district judge's decision to eliminate an appeal. No such case is on the books. The federal appellees, however, did just that - they improperly relied on Curtiss-Wright for the proposition that Rule 62(h) can be utilized subsequent to a certification to preclude an appeal. Such a proposition cannot be derived from any reading, fair or otherwise, of Curtiss-Wright. The federal appellees have exhibited a lack of remorse concerning the true character of the arguments made in their Rule 27 motion. This leads petitioners to wonder if the federal appellees were engaged in redneck fun outside of the library when they first made this argument. In any event, the federal appellees argued speciously that the district court judge could execute a certificate of finality pursuant to Rule 54(b) and swiftly eliminate the petitioner-appellants' right to take an immediate appeal through mere allusion to Rule 62(h). This is nonsense.

No court in the land has held that a district court judge can execute a certificate of finality and subsequently prohibit an immediate appeal of the certified order. The Court of Appeals accepted this flawed argument when it granted the appellees Rule 27 motion to dismiss for lack of jurisdiction over the appeal on grounds that the district court judge could legitimately block an immediate appeal of his own self-certified order.

The Court of Appeals in view of existing precedent knew or should have known that this reasoning was dark and in error.

In order to lose its statutory jurisdiction over an appeal as of right from a final order, the appellate court had to assess and disturb the district court certification. The Court of Appeals did not and does not intend to challenge the propriety of the district court certification and its clearly unreasonable decision to prevent the petitioners from taking an immediate appeal from a final order.

Unless and until this Court reviews the work of the court of appeals, petitioners don't have a horse in this race. Without review of their writ by this Court, Petitioners have as much hope of obtaining due process of law as they do of summoning a unicorn out of the woods.

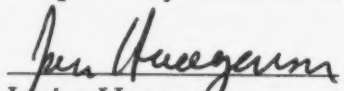
Petitioners are being beaten to death, in a legal sense, while the appellate court is cold sober. The Third Circuit Court of Appeals apparently does believe that it never had jurisdiction over the appeal, even though the district court executed a certificate of finality, which the Third Circuit never disturbed. The conduct of the district court judge has not been scrutinized by the Third Circuit; it has been endorsed, as has the self-serving conduct of the federal appellees.

The federal attitude is that the truth is not for everyone. By no means is this a constitutional regime.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Janice Haagensen
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October 24th, 2002

## APPENDIX

APPENDIX A — Clerk's denial of Petitioner-Appellants' Rule 27 Motion for Correction of Record and Issuance of Mandate

UNITED STATES COURT OF APPEALS
FOR THETHIRD CIRCUIT

No. 01-4118

Grine v. Coombs

To: Clerk

1) Appellant's Rule 27 Motion for Correction of Record and Issuance of Mandate

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The foregoing Motion is denied. The appeal was decided by an order on a motion and not by the entry of a formal judgment. Rule 41, Federal Rules of Appellate Procedure, requires the issuance of a mandate only when a formal judgment is entered. The purpose of the mandate is to return jurisdiction back to the district court and to convey any directives of the court of appeals to district court. Since this Court determined that it lacked appellate jurisdiction over the appeal, neither of those purposes would have been served by issuance of a mandate.

The February 27, 2002 order dismissing the appeal was certified to the district court on the date that it was issued. Since this Court never had jurisdiction over the matter, jurisdiction would not have been lost through the certification of that order to the district court.

It is further noted that the issuance of a mandate has no effect on the time deadlines for filing a petition for a writ of certiorari. Rule 13.2, Supreme Court Rules.

Accordingly, no mandate has, or will, issue in the appeal nor was one required.

For the Court,
/s/Marcia M. Waldron
Clerk

Dated: August 29, 2002

DMM/cc: Janice Haagensen, Esq.
Bonnie R. Schlueter, Esq.
Russell F. Smith III, Esq.

Received and Filed
8-29-02 DM
Marcia M. Waldon,
Clerk

APPENDIX A